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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 762

TAR ASPHALT TRUCKING CO., INC.,

Appellant,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES OF AMERICA,

Appellees.

On Appeal from United States District Court for the District of New Jersey

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
STATEMENT AS TO JURISDICTION	1
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
QUESTIONS PRESENTED	3
STATEMENT	6
QUESTIONS ARE SUBSTANTIAL	11
Argument:	
A	11
B	12
C	17
D	18
E	20
F	21
G	23
CONCLUSION	24
APPENDIX A:	
Opinion Below	1a
APPENDIX B:	
Report of the Interstate Commerce Commission, Tar Asphalt Trucking Co., Inc. MC-93207 (Sub' 9)	10a

PAGE

APPENDIX C:

Order of the Commission of December 18, 1961.. 17a

APPENDIX D:

Sec. 203 (a) (15), Interstate Commerce Act, 49 U.S.C. 303 (a) (15)..... 19a

APPENDIX E:

Sec. 212 (c), Interstate Commerce Act, 49 U.S.C. 312 (c)..... 20a

APPENDIX F:

1957 Amendment to Sec. 209 (b) Interstate Commerce Act, 49 U.S.C. 309 (b)..... 21a

APPENDIX G:

Sec. 203 (a) (14), Interstate Commerce Act, 49 U.S.C. 303 (a) (14)..... 23a

APPENDIX H:

Pertinent Provisions of Fifth Amendment, United States Constitution..... 24a

Cases Cited

American Trucking Associations, Inc. v. U. S., 364 U. S. 1..... 2

Armored Motor Car Service Co., Inc., Conversion Proceeding, 77 M.C.C. 443..... 15

California Water & Telephone Co. v. Railroad Commission of California, 19 F. Supp. 11..... 24

Craig Contract Carrier Application, 31 M.C.C. 705.. 15

PAGE

Interstate Commerce Commission v. Jersey City, 312 U. S. 503 2

Michigan Commission v. Duke, 265 U. S. 570 23

Schaffer Transportation Co. v. U. S., 355 U. S. 83 2

T. T. Brooks Trucking Co. Inc., 81 M. C. C. 561 22

U. S. v. Contract Steel Carriers Inc., 350 U. S. 409 ... 12, 19

United States Constitution Cited

Fifth Amendment 3, 6, 23

Statutes Cited

Interstate Commerce Act:

28 U.S.C. 1253 2

28 U.S.C. 1336 2

28 U.S.C. 2101 (b) 2

49 U.S.C. 303 (a) (14), Sec. 203 (a) (14) ... 3, 5, 17, 19, 21

49 U.S.C. 303 (a) (15), Sec. 203 (a) (15) ... 3, 5, 11, 17-21

49 U.S.C. 305 (d), Sec. 205 (d) 18

49 U.S.C. 309 (b), Sec. 209 (b) 3, 9, 11, 12, 18

49 U.S.C. 312 (c), Sec. 212 (c) 3, 4, 6, 9, 11

National Transportation Policy:

49 U.S.C., Note Preceding Section 1 23

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Jurisdictional Statement

Appellant Tar Asphalt Trucking Co., Inc., appeals from the judgment of the United States District Court for the District of New Jersey, entered on September 24, 1962, dismissing its complaint to set aside an order of the Interstate Commerce Commission, dated December 18, 1961, directing the revocation of the permits of plaintiff as a Con-

tract Carrier under the Interstate Commerce Act and in lieu thereof, directing that a Certificate of Convenience and Necessity be issued to it as a Common Carrier under said Act and to stay and enjoin the enforcement of the Commission order. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the United States District Court for the District of New Jersey is reported in 208 F. Supp. 611. A copy of the opinion is attached as Appendix A.

The report of the Interstate Commerce Commission is reported in 88 M.C.C. 443. A copy of the report is attached as Appendix B.

Jurisdiction

This suit was brought under 28 U.S.C. 1336, to set aside an order of the Interstate Commerce Commission. The judgment of the United States District Court for the District of New Jersey was entered on September 24, 1962. Notice of Appeal was filed in that court by appellant on November 20, 1962. The jurisdiction to review the decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal, *American Trucking Associations, Inc.* v. *U. S.*, 364 U. S. 1; *Interstate Commerce Commission* v. *Jersey City*, 312 U. S. 503; *Schaffer Transportation Co.* v. *U. S.*, 355 U. S. 83.

Constitutional Provisions and Statutes Involved

Pertinent provisions of the Fifth Amendment to the United State Constitution, are set out in the appendix at page 24a.

Sections 203 (a) (15), 212 (c), 209 (b) and 203 (a) (14) of the Interstate Commerce Act (49 U. S. C. 303 (a) (15), 312 (c), 309 (b) and 303 (a) (14)), which are set out in the appendix at pages 19a to 23a.

Questions Presented

1. Was the lower court correct in holding that the 1957 amendment to the Interstate Commerce Act, contained in subsection (c), overruled the decision of the Supreme Court of the United States in the Contract Steel Carriers case, in view of the limitations placed upon Commission action by Sec. 209 (b) regarding existing carriers.

2. Was there substantial evidence in the record to support the Interstate Commerce Commission's report and order that the contract carrier permits of appellant-carrier be revoked and a certificate of convenience and necessity be issued in lieu thereof to appellant as a common carrier, and to support the Commission's findings a) that appellant's operations do not conform to the amended definition of a Contract Carrier; b) that appellant's operations are those of a Common Carrier.

3. Was there substantial evidence in the record to support the Commission's subordinate findings

a) that the same equipment was required for the transportation of the products of all of the customers of appellant

b) that the insulated equipment operated by the appellant was all equipped with heating units and pumps and extra long hoses to facilitate the unloading of asphalt;

c) that the evidence failed to disclose a separate distinct need of a particular customer for which appellant's equipment was peculiarly intended;

d) that appellant's equipment was designed for a type of product produced by a class of customers and not for the specialized requirements of a particular product of a single customer;

e) that the record failed to establish that any of appellant's customers had individual requirements relating to transportation of its product which was peculiar to its business and for which appellant provided a "tailor made" service to meet the individual customer's distinct need;

f) that appellant did not assign motor vehicles for a continuing period of time to each person served;

g) that appellant did not furnish transportation services designed to meet the distinct need of each individual shipper as required by the amended definition of a "contract carrier";

h) that appellant's witness testified that appellant will enter into a transportation contract with any shipper requesting such service provided agreeable terms for such service are arrived at;

i) that the appellant will serve the ordinary needs for transportation of any shipper of the commodities which it is equipped to handle within the area of operation.

4. Where should the burden of proof lie in a "conversion proceeding" under Sec. 212 (c) of the Intestate Commerce Act; with the carrier, who is a respondent or with the Commission who initiates the proceedings to change the carrier's status?

5. Was the Commission justified in holding as a matter of law, that appellant's contracts with 19 individual shippers, some of whom are competitors, cannot be regarded as contracts with a limited number of persons within the meaning of Section 203 (a) (15) of the Act, but must be regarded as a holding out of service within the meaning of 203 (a) (14) of the Act, when amending Section 209 (b) of the Interstate Commerce Act prohibits any limitations of numbers of contracts being included in the permits of an existing contract carrier and only authorizes Commission inquiry into the scope of additional operations, when additional contracts are added by an existing contract carrier?

6. Does the fact that the carrier may be acting for its own convenience in assigning vehicles for a continuing period of time to the exclusive use of shippers, rather than for the convenience of such shippers, without more, place such "exclusive use" operations outside the scope of the amended definition of a contract carrier, even though there is no qualifying limitation in the definition itself regarding convenience, and so justify the Commission in excluding such operations from further consideration in its determination of whether some of the carriers operations come within the amended definition of a contract carrier "through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served"?

7. May the Commission, in revoking the permits of a contract carrier and issuing to it in lieu thereof a certificate of convenience and necessity as a common carrier in a conversion proceeding, impose restrictions in said newly issued certificate against tacking and joining separately stated grants of operating authority in order to furnish a through transportation service, even though tacking and joining are now permitted by the Commission to existing common carriers to provide a through transportation service, and thus

discriminate against common carriers, converted from contract carriers and in favor of existing common carriers?

8. May the holder of a regularly issued permit as a contract carrier under the "Grandfather clause of the Interstate Commerce Act, be converted against its will from a contract carrier into a common carrier certificate holder, by legislative redifinition or administrative interpretation, with the added burdens of common carrier status, if the evidence does not establish that the carrier's operations are those of a common carrier, in view of the prohibitions of the Fifth Amendment to the Constitution of the United States against the taking of private property for public use without just compensation and against the taking of private property without due process of law?

(b) Did the District Court err in failing to consider the Fifth Amendment issue though raised below by the pleadings and appellant's brief?

Statement of the Case

Plaintiff, Tar Asphalt Trucking Co., Inc., the holder of two permits as a Contract Carrier, issued to it under the "Grandfathers" clause following the adoption of the Motor Carriers Act, is and has been continuously since 1932 (prior to the effective date of the Act) engaged in hauling liquid asphaltic products and coal tar derivatives (mostly in tank trucks) under separate, continuing contracts with each individual customer. Following the amendment of the Act in 1957, amending the definition of a "Contract Carrier", the Commission, Division 1 thereof, on its own motion under Sec. 212 (c) of the Act, instituted a conversion proceeding on January 24, 1958 and hearing therein was held before a Commission Examiner on December 1, 1960 at Philadelphia, Pa. Evidence was adduced from the plaintiff's General Office Manager and its records and

copies of its separate contracts with shippers and by late filed exhibits. Judicial Notice was also taken by the Examiner of pertinent evidence in the Commission's own files.

The evidence adduced at the hearing indicated that the carrier, on August 22nd, 1957, and until the date of the hearing on December 1, 1960, has been engaged in furnishing transportation services under approximately 19 separate and continuing contracts to individual shippers in the cartage of liquid asphalt, road oils and other coal tar derivatives, in interstate commerce (mostly by tank truck) within the areas delineated in its permits; that it owns 7 tractors, 12 tank trailers, and 1 flat bed trailer; that it has leased as many as 6 tractors and 5 trailers, with drivers, for additional service in its operations; that its business was somewhat seasonal; in the spring and summer road construction periods its use of leased equipment was greater.

The evidence further indicated that this carrier, back in 1932, was the first in its field in this part of the United States to transport asphaltic products in tank trucks; rail tank car service was proving unsatisfactory for manufacturers because of freezing and solidifying of the asphaltic product in the tank cars during the winter months in the area; that the carriers equipment to handle this product year around was specially designed by the company and burners were applied to the tank equipment so as to keep the product in a liquified state from the pick up point at the refinery to the customer's place of business even during the winter months; that at the time there was no other motor carrier engaged in such an operation.

From the evidence it appeared that plaintiff-carrier's operations fall roughly into three categories; 1) transportation of asphaltic products, having varying characteris-

tics, for roofing, siding and shingle manufacturers; 2) transportation of road oils and asphalts to road builders; and 3) the transportation of diverse products for two particular customers, requiring the assignment of equipment to the exclusive use of each, for a continuing period of time.

Additional documentary evidence, requests for findings of fact and a short summation of the evidence adduced was also submitted by the plaintiff.

Following the conclusion of the hearing the Examiner filed his report and recommended order. Plaintiff filed exceptions thereto and a brief of argument in support thereof and requested oral argument thereon; the Commission, by Division 1 thereof, denied the request for oral argument and proceeded to its decision.

On June 13, 1961, the Commission (again by Division 1), rendered its decision by way of report and order and found that the operations of plaintiff were those of a common carrier by motor vehicle and not those of a "Contract Carrier", under the new definition of a Contract Carrier set out in the 1957 amendment to the Act; that the permits of plaintiff as a contract carrier by motor vehicle should be revoked and in lieu thereof a certificate should be issued to plaintiff as a common carrier by motor vehicle of the same commodities and from and to the points or territories authorized in the previously held permits of plaintiff as a contract carrier, upon compliance by plaintiff with the requirements of Sections 215, 217 and 221 (c) of the Interstate Commerce Act within 150 days of the date of service of said order of the Commission, dated June 13, 1961.

Conceiving that the said report denied to plaintiff the continuing status of a contract carrier to which it was entitled under the previous definition of a contract carrier and to which it holds it is still entitled under the amended

definition in the Act of a contract carrier, and that the order of the Commission, implementing its report, would require the plaintiff to comply with Sections 215, 217 and 221 (c) of the Act (furnish cargo insurance, file printed tariffs and a new designation of an agent for the service of process) within 150 days of its service, and that on failure to comply, plaintiff's permits as a contract carrier would be revoked and that it would then be out of business, plaintiff thereupon filed its original complaint in the United States District Court for the District of New Jersey on August 16, 1961, asserting generally the foregoing facts and alleging numerous deficiencies in the Commission's conclusions, findings and report and sought by its complaint to have the said order of the Commission set aside and its enforcement stayed and enjoined.

Following the service of the complaint and while the action was pending, the Commission, on its own motion, reopened the proceedings for reconsideration of the existing record.

Following reconsideration the Commission rendered its decision, by way of report and order, and found that its previous report was deficient in that it had failed to make certain specific findings, required by Sec. 212 (c) of the Act. In its said report it made specific findings that the operations of the plaintiff did not and do not conform to the amended definition of a contract carrier; that they are the operations of a common carrier; that they are otherwise lawful.

Generally, in all other respects, the findings and conclusions contained in the report of June 13, 1961 were affirmed; particularly that the permits of the plaintiff, as a contract carrier, should be revoked and in lieu thereof a certificate of convenience and necessity should be issued to the plaintiff as a common carrier for the same points

and commodities but providing that there be no tacking or joining of authorities to provide a through transportation service. It was further provided by both the report and order that the certificate as a common carrier was only to be issued to plaintiff if it had complied with Sections 215, 217 and 221 (c) within 150 days of the order, and if plaintiff had failed to comply within said time, plaintiff's permits as a contract carrier would be revoked (even though no certificate as a common carrier had issued).

Plaintiff, on January 22, 1962, filed an amended complaint, reciting generally the foregoing facts and again alleging numerous deficiencies in the Commission's conclusions, findings and report of December 18, 1961, and praying that the implementing order of the Commission, also dated December 18, 1961, be stayed, enjoined and set aside.

The Commission and the United States answered the amended complaint by a joint answer and admitted generally all of the facts alleged in the amended complaint but denied the claimed status of the plaintiff as a contract carrier and they denied all of the alleged deficiencies of the Commission in reaching its findings and conclusions and in issuing its report and order.

Upon the filing of the joint answer of the defendants, a three-judge statutory court was convened and, on the record before the Commission, and the pleadings, briefs and oral arguments of the parties, heard the case on May 9, 1962. On September 12, 1962, the Court filed its opinion sustaining the Commission's report and order finding there was substantial evidence in the record in support thereof. An appropriate order dismissing plaintiff's complaint was entered on September 24, 1962. Notice of Appeal to the Supreme Court of the United States was filed in the United States District Court for the District of New Jersey on November 20, 1962.

The Federal Questions are Substantial

This is the first case of appellate consideration of the Interstate Commerce Commission's interpretation of the 1957 amending definition of a contract carrier by motor vehicle under the Interstate Commerce Act and of the scope and nature of a "conversion proceeding" under amending section 212 (c) of said act and of the limitations placed upon the Commission against limiting the numbers of contracts held by an existing contract carrier, by amended section 209 (b) of the Act and the effect of said limitations.

Serious problems of construction, interpretation and administration under these amendments to the act are presented, affecting all permit holding contract carriers, not yet converted to common carriers under 212 (c) of the Act. Not only are the questions important to this carrier-appellant, they are important to all contract carriers, "converted", unconverted and yet to be converted. Their resolution would act as a guide to the Commission in further administering the act and would pass upon the interpretations that have been given by the Commission to the terms employed in the amended definition of a contract carrier, *viz.*: "through the assignment of vehicles for a continuing period of time to the exclusive use of each person served"; "contracts with a limited number of persons"; "transportation services designed to meet the distinct need of each individual customer".

Their resolution would serve to clarify to carrier and shipper alike the meanings to be accorded to these terms in the future.

A

The opinion of the lower court held that the 1957 Amendment to the Interstate Commerce Act, contained in Sub-

section (c), overruled the decision of the Supreme Court of the United States in the *Contract Steel Carriers* case (350 U. S. 409).

In view of the limitations placed upon Commission action by the proviso in Section 209 (b) of the Act against any limitations in the carrier's permits of the number of contracts an existing carrier could add, the question is presented whether the lower court was correct in holding that the 1957 Amendment overruled this Court's decision in the *Contract Steel Carriers* case or whether the decision is still the law as far as contract carriers existing on the effective date of the 1957 act are concerned.

B

While this Court is not lightly to undertake a consideration of the whole record to determine if there is substantial evidence in the record to support the Commission's findings and particularly when the court below has so held, when the only evidence in the case is that adduced by the appellant and that evidence is uncontroverted in any respect and it is strenuously suggested that the evidence not only does not substantially support the Commission's findings but calls for a contrary conclusion, this Court may, in the exercise of its discretion, review the record to reach its own determination of that question.

a.

The evidence in this case showed the assignment of two vehicles for a continuing period of time to the exclusive use of two shippers. Because the Commission found that these assignments were for the convenience of the carrier, it refused to consider the operations as meeting the statutory test.

b.

The evidence further showed the furnishing of transportation service designed to meet the distinct need of each individual customer.

It shows that appellant company, about 1932, commenced the trucking of liquified asphalt products in tank trucks, specially designed by the company for that purpose, and equipped with "burners" to keep the product in a liquified state throughout the year, including the winter months; that such operations, as far as the officers knew, was the first of its kind in the eastern part of the United States.

As time went on, to meet the special needs of its customers appellant developed different types of specialized equipment such as insulated tank trucks, and later, insulated tank trailers; trucks, and later tractors, with built-in pumping equipment to discharge cargo of high density used by customers in their business; auxiliary portable burners to maintain constant temperature of product during transportation. Each were developed to meet a distinct and different need of a particular shipper at the time because of the difference in type of product than that transported for other shippers.

In addition to the development of additional and different types of equipment to meet the distinct needs of its customers, as time went on it also developed and furnished service "to meet the distinct need" of each customer; needs distinct because of the particular type of product carried, because of the type of customer's job operations, such as road construction, because of the peculiar nature of some consignee's facilities, such as distance of receptacle from highway; because of the need for pick-up and delivery at specified times; By the time of the effective date of the amended definition (August 22, 1957), plaintiff was furnishing different types of equipment to carry the differ-

ent types of products of each customer, including different types of equipment for asphalt used in paint manufacturing and for asphalt used in shingle manufacturing; it was furnishing a long hose and pump for one particular shipper; it was providing a barrelling and weighing service on delivery for another particular shipper; it was having a piece of its equipment at a refinery at a specified time to take on a load of a special product and to discharge the load at a specified time at the plant of the customer, maintaining a fixed high temperature throughout the trip because of the customer's special need; it was furnishing delivery of asphalt and road oils daily to progressing sites of delivery during the progress of road construction for different road construction contractors; it was supplying drivers experienced with the inherent qualities and characteristics of the different types of products being transported for each of the customers served.

All of this is present in the record and it adds up to "transportation services, designed to meet the distinct need of each individual customer."

Each of the appellant's customers has a distinct need to have asphalt or asphaltic products delivered to him in a liquid state throughout the year, including the winter months; in addition, one customer needs his kind of asphalt delivered to him in an insulated tank, the next does not; one customer needs his kind of asphalt discharged by pump because of the high density of the type he uses, the other does not; one needs the temperature maintained on his kind of asphalt throughout the shipment, the next does not; one needs pick-up and discharge of his kind of asphalt to be at specific hours, others do not; one needs special equipment provided for him to discharge his product into his receptacles because of their distance from the road, the others do not; three need delivery of the product to progressively

advancing points of delivery as road construction moves forward, the remainder do not; Each and all of them need experienced handlers of the varying products with knowledge of the different characteristics of each product. These things are not offered by common carriers; they are not in a position to offer them.

While it is true that each individual customer must have a "distinct need" of services designed to meet that need, the fact that two or more customers of appellant have the same "distinct need" does not change the result. The definition requires that the service must be designed to meet the distinct need of each customer, not that the customer's needs must be distinct from the needs of all other customers of the carrier. The Commission recognized this in the case of *Armored Motor Service Co. Inc., Conversion Proceeding*, 77 M.C.C. 433 (1958), in which contract carrier status was sought by the carrier, an armored car service to banks and where the Commission held that the applicant provided a tailor made service for particular customers under individual contracts and was a contract carrier, in that all of the customers had a need for (police protection to safeguard the commodities entrusted to their care) in transporting their valuables, but in addition each had individual requirements relating to the transportation of the considered commodities, which were peculiar to its business and the applicants conducted their operations in a manner calculated to satisfy such demands.

In the case of *Craig Contract Carrier Application*, 31 M. C. C. 705 (1941), the Commission, at pg. 711, amongst other things held that the specialization it had in mind might consist in the rendition of other than the usual physical services for the purpose of supplying the peculiar needs of a particular shipper, such for example, as the furnishing of equipment especially designed to carry a particular type of commodity, the training of em-

ployees in the proper handling of particular commodities or the supplying of related non-transportation services such as the assembling, placing or servicing of machinery.

The evidence here does not lend substantial support to the Commission's findings that plaintiff's operations do not conform to the amended definition of a contract carrier or its subordinate findings in its report that the appellant does not furnish transportation services designed to meet the distinct need of each individual shipper.

c.

The evidence in the record did not substantially support the Commission's finding that appellant's operations have been and were those of a common carrier by motor vehicle and its subordinate findings that the appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority. The evidence discloses this, that on any inquiry from a prospective customer, the office manager of the appellant asks the shipper some of the key questions—the estimated quantity for a year or years they may want the service—whether the service will be constant, by the day, by the week, by the month—whether it is seasonal and any other important particular; following which the president goes over to the shipper or discusses the matter by phone and the president decides whether the shipper is accepted or not; if they come to an agreement the president directs the office manager to type up a contract, which is sent to the shipper for signature.

This is a far cry from "convincing evidence" that the carrier is holding itself out to the general public.

If there are any doubts on the subject they are resolved for us by a reference to the report of the Commission, (Appendix B) and the statement therein that "from

August 22, 1957 until December 1, 1960 (the date of the hearing before the Examiner) appellant carrier had but 19 effective continuing contracts with shippers."

This means that in a period of three years, the critical three years under review, the carrier did not acquire even one new effective contract.

But the Commission further found that appellant's contracts with 19 individual shippers could not be regarded as contracts with a limited number of persons within the meaning of 203 (a) (15) but must be regarded as a holding out within the meaning of 203 (a) (14). As will be separately developed later, the Commission was not justified in considering the number of contracts held by an existing contract carrier in determining if they were contracts with a limited number of persons.

It is on this evidence and on the conclusion that 19 contracts amount to a holding out under 203 (a) (14) of the act that the Commission concludes that appellant's operations have been and were those of a common carrier by motor vehicle.

This is less than substantial evidence in the record to support such findings and the subordinate findings that appellant holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority.

C

A conversion proceeding brought under Sec. 212 (c) is essentially an adversary proceeding. The Commission is empowered but not directed to initiate a proceeding after notice and hearing, and revoke a permit if it finds that the operations of any person on the day the subsection takes effect, do not conform with the definition of a con-

tract carrier in section 203 (a) (15). The carrier is a respondent in such a proceeding. Where should lie the burden of proof? This question has not yet been considered by an appellate court. In application proceedings under Sec. 209 (b) for a permit or under 206 (b) for a Certificate of Convenience and Necessity the burden of proof is always on the applicant, the initiator of the proceeding. But here there is no applicant, the initiator is the Commission. Must the respondent again prove his continuing right to the permit?

The amendments to the act do not treat of this. It is a procedural step in the administration of the act that needs clarification for the better administration of the act. The Commission, in the Court below, took the position that the point was waived because not raised. The court below seemed to hold that the statutory power reposed in the Commission by 49 U. S. C. 305 (d) (to compel attendance of witnesses etc.) would have enabled the Commission to reach the same conclusion if appellant had not presented its witnesses and exhibits before the Examiner. The court's holding left unresolved the fundamental question, "Who had the obligation to establish by a preponderance of the evidence that appellant was a contract carrier within the amended definition of the act: that appellant was not a common carrier?" A substantial question of procedure in conversion cases is thus raised.

D

In reaching its ultimate conclusion that the appellants services are and have been those of a common carrier, the commission arrived at a subordinate finding that appellants "contracts with 19 individual shippers, some of whom were competitors, cannot be regarded as contracts with a limited number of persons within the meaning of

203 (a) (15) of the act but must be regarded as a holding out of service within the meaning of 203 (a) (14)".

In this, the Commission is attempting to apply a criterion struck down by this Court's decision in the *Contract Steel Carriers* case (350 U. S. 409) and which the Commission sought to have reestablished by Congress, following that decision. In connection with existing contract carriers (as distinguished from future contract carriers) Congress refused to permit the Commission to impose a numerical limitation. Its Senate Interstate and Foreign Commerce Committee added to the proposed bill submitted by the Interstate Commerce Commission, its own section 209 (b) of the act which provided,

> "* * * That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this provision which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless * * * the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier * * *."

As so added, the bill was adopted by Congress.

By specifically inserting this provisio Congress made its intention clear that there were to be no numerical limitations on the contracts held or to be held by existing contract carriers as distinguished from future contract carriers.

In reaching its conclusion that appellants "contracts with 19 individual shippers, some of whom are competitors, cannot be regarded as contracts with a limited number of persons within the meaning of Section 203 (a) (15)," the commission is giving consideration to the "number"

of contracts held, when this appears contrary to the clearly expressed intention of Congress, when it amended the act and added to the bill the proviso against limitations on numbers of contracts being imposed in the permits of existing contract carriers.

Is this Commission's finding contrary the intent of Congress, particularly when the record indicates and the Commission's report found that in the three critical years from August 22, 1957 to December 1, 1960, the carrier had added not one contract; that during all that period it was operating under 19 effective contracts?

E

The evidence in the record indicated that appellant was assigning vehicles for a continuing period of time to the exclusive use of two of carrier's shippers. The Commission, in its report, found that they were apparently set aside for the convenience of the carrier and then gave no further consideration to this "exclusive use" operation in reaching a determination whether appellant's operations were those of a contract carrier "through assigning vehicles for a continuing period of time to the exclusive use of each person served." The District Court likewise was of the opinion that since the setting aside of these vehicles was for the convenience of the carrier, that they did not constitute the setting aside of vehicles for the exclusive service of a particular shipper.

There is no qualifying limitation in the amended definition concerning the assignment of vehicles to the exclusive use of each person served based upon for whose convenience the vehicles are assigned, the shipper or carrier. The pertinent words of the amended definition are

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor

> vehicle * * * under continuing contracts * * * either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served.

It thus appears that the Commission is attempting to add a qualifying condition to the definition. A substantial question is presented whether the Commission in determining if a carrier meets the amended definition of a contract carrier may add additional conditions to those already laid down by Congress in the definition enacted by it.

F

In its report and order of December 18, 1961, the Commission, after directing that the appellant's contract carrier permits be revoked and a certificate of convenience and necessity be issued to it as a common carrier, further directed that there be no tacking and joining of separately granted authority to provide a through transportation service by appellant. At that time tacking and joining of separately stated grants of authority were permitted to existing common carriers. When Congress amended the definition of a contract carrier (Sec. 203 (a) (15)), it did not amend the definition of a common carrier as it appears in 203 (a) (14). Congress was familiar with tacking and joining by common carriers and it appeared satisfied to let the existing circumstance to continue. If it wished to have limited the converted common carrier from tacking and joining it could have done so in the amendments adopted or by amending Sec. 203 (a) (14). It did neither.

The effect of the Commission's action in this matter in denying tacking and joining to the converted common carrier, while allowing tacking and joining to existing common carriers, is to create in the future two classes of

common carriers and to discriminate between them. This seems to be at variance with the Congressional intent in amending the contract carrier definition while retaining the existing common carrier definition.

As the common carrier definition stands now (and as it stood before the 1957 amendment of the definition of a contract carrier) it appears to provide for only one all inclusive class. The action of the Commission in denying tacking and joining to the converted common carrier while allowing it to the existing common carriers will be to create two classes of common carriers, each with the same responsibilities but one enjoying privileges denied to the other. That the result of such action will have the effect outlined is supported by the dissenting opinion of Commissioner, McPherson in the *Conversion Proceeding, T. T. Brooks Trucking Co., Inc.*, 81 M. C. C. at 580.

As he there points out, Congress was familiar with the long standing policy of generally permitting tacking of common carrier authority; if it wished to limit the converted carrier it could have done so in the amendment.

The Commission has urged the concept of "substantial parity of operations" as justifying its refusal to allow tacking and joining to converted common carriers and has cited its opinion in the *T. T. Brooks* case (*supra*) as outlining its reasons. While the concept of "substantial parity of operations" had its proper place in the consideration of the extent of the authority to be granted under an original "Grandfather Clause" applications for permits, in order to achieve substantial parity among the applying contract carriers, the concept has no proper application in limiting the rights of converted common carriers to less than those enjoyed by existing common carriers with whom the converted carrier must compete now for the first time. This limitation does not serve the con-

cept of parity between the two kinds of common carriers as its earlier application did among all contract carriers. It handicaps one and benefits the other. Nor is the National Transportation Policy served by denying a through transportation service to the public by one class of common carriers while permitting it to the other. The only beneficiaries of such a limitation are the existing common carriers. A substantial federal question of discrimination between carriers under the Act appears to be presented.

G

It was urged upon the lower Court by the pleadings and appellant's brief that if the evidence did not establish that the carriers operations were those of a common carrier, appellant, as a contract carrier could not be converted into a common carrier against its will by legislative redefinition or administrative interpretation thereunder, in view of the Fifth Amendment prohibitions against the taking of private property for public use without just compensation and against the taking of private property without due process of law.

Under the decision in *Michigan Commission* v. *Duke*, 266 U. S. 570, 578 (1925) it was held that it was beyond the power of the state by legislative fiat to convert property used exclusively in the business of a private carrier, into a public utility or to make the owner a public carrier, for that would be taking private property for public use without just compensation, which no state can do consistently with the due process clause of the Fourteenth Amendment.

It has also been held that the limitations on the power of Congress or the Federal government imposed by the Fifth Amendment against taking private property for public use without just compensation are the same as

those imposed on the states by the Fourteenth Amendment. *California Water & Telephone Co.* v. *Railroad Commission of California* D. C. Cal. 1937 19, F. Supp. 11.

The lower Court considered whether there was a Fourteenth Amendment question and held there was not; it did not reach or pass upon the Fifth Amendment question.

CONCLUSION

Appellant respectfully suggest that this appeal brings before this Court federal questions that are important and whose implications are nation-wide, equally in terms of legal principles, administrative procedures and in their impact upon contract carriers, whether converted, unconverted or yet to be converted, and upon the shipping public who use the contract carrier service; that a proper showing has been made to indicate that the questions are so substantial as to require plenary consideration with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

JOHN J. CORCORAN, JR.
Counsel for Appellant

APPENDIX A

Opinion of the United States District Court, District of New Jersey

(Filed September 12, 1962)

By WORTENDYKE, D. J.:

This action is brought to set aside the report and order of the Interstate Commerce Commission (Commission) entered December 18, 1961 in Docket No. MC-93207 (Sub No. 99), Tar Asphalt Trucking Company, Inc., Conversion Proceeding. This Court's jurisdiction is derived from 28 U. S. C. §1336, and was exercised as a Three-Judge Court pursuant to sections 2284 and 2321-2325 of that Title.

Prior to the institution of the Proceedings by the Commission on January 24, 1958, Tar Asphalt Trucking Company, Inc., hereinafter referred to as Tar Asphalt, had been operating as a contract carrier by motor vehicle, under 10 C permits dated respectively September 13, 1946 and March 30, 1948, for the transportation of coal tar, coal tar distillates and residue, asphalt and asphaltic admixtures in bulk, in tank trucks. The Conversion Proceedings were instituted by the Commission pursuant to the provisions of 49 U. S. C. §312(e). That statutory subdivision directed the Commission to examine each outstanding permit issued to a motor carrier, and authorized the Commission to institute, within 180 days after August 22, 1957, a proceeding upon its own initiative to revoke a permit and to issue in lieu thereof a certificate of public convenience and necessity if it found that the operations of the permit holder on that date did not conform with the definition of a contract carrier contained in 49 U. S. C. §303(a)(15); but were those of a common carrier, and were otherwise lawful. That statutory

definition of "contract carrier by motor vehicle" is "any person which engages in transportation by motor vehicle of * * * property in interstate * * * commerce, for compensation (other than transportation referred to in paragraph (14)[1] of this section and the exception therein), under continuing contracts with one person of a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

Protests against the conversion of Tar Asphalt from a contract carrier to a common carrier were filed by five motor vehicle carriers, but at the hearing before the Commission's Examiner, on December 1, 1960, no testimony in behalf of the protestants was offered, and only one witness testified in behalf of Tar Asphalt.

The Commission's Examiner found that Tar Asphalt's operations on August 22, 1957 did not conform to the statutory definition of contract carrier, but were those of a common carrier by motor vehicle, although otherwise lawful. He accordingly recommended that an appropriate certificate issue to Tar Asphalt to operate as a common carrier by motor vehicle and that its permits to operate as a contract carrier be revoked. Tar Asphalt filed exceptions to the Examiner's recommended order. Upon due consideration, Division 1 of the Commission, by its order of June 13, 1961, directed that certificate of public convenience and necessity issue to Tar Asphalt, authorizing its operation as a common carrier by motor vehicle for the transportation of the com-

[1] Subsection (14) defines a common carrier by motor vehicle.

modities, to and from the points, and within the territories authorized by its permits as a contract carrier, upon its compliance with the requirements of the Act. The period within which Tar Asphalt was directed by the Commission's order of June 13, 1961 to comply with the statutory prerequisites for the issuance of a certificate as a common carrier, was extended for a period of 60 days, by order of October 10, 1961. The Conversion Proceedings were reopened by order of November 8, 1961, of Division 1 of the Commission, whose further order of December 18, 1961[2] also adopted the Examiner's findings and those of its previous order, and again concluded, after reconsideration, that Tar Asphalt's operations did not conform to the definition of a contract carrier, but were those of a common carrier by motor vehicle, and were otherwise lawful.

Upon the oral argument before this Court, on May 9, 1962, it appeared that the record before the Commission had not been filed by Tar Asphalt, and the defendants urged that the Court dismiss the action for that reason; citing *Mississippi Valley Barge Line Co.* v. *United States* 1934, 292 U. S. 282, 286. The plaintiff filed the record within the prescribed period following the completion of the oral argument, pursuant to leave granted by the Court.

Upon consideration of the testimony and exhibits given and admitted before the Commission's Examiner, we conclude that the Commission's order, here presented for review, was supported by substantial evidence. The evidence adequately sustains the inferences that (1) Tar Asphalt's operations do not conform with the definition of a contract

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[2] The complaint in the case before this Court was filed August 15, 1961; but, following the Commission's order after reconsideration, an amended complaint was filed herein on January 22, 1962. Defendants answered the amended complaint on February 9, 1962.

carrier in section 303(a)(15) of the Act; (2) its operations are actually those of a common carrier; and (3) its operations are otherwise lawful. In order to conform with the statutory definition of a contract carrier, the carrier must operate "under continuing contract with one person or a limited number of persons" (1) for the furnishing of transporation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, or (2) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

That the Commission's interpretation of section 212(c) of the Act accords with the congressional intent in its enactment in 1957 will appear from a perusnal of the legislative history set forth in 1957 U. S. Code Cong. & Admin. News, at page 1604. The Senate Committee on Interstate and Foreign Commerce, to whom the bill to revise the definition of contract carrier by motor vehicle was referred concluded that the then present law (49 U. S. C. 303(a)(15)) was "inadequate in some respects and that corrective legislation * * * (was) necessary. * * * The decision of the Supreme Court in United States v. Contract Steel Carriers points out clearly a need for a change in the statute. Without it, proper and sound administration and regulation in the public interest cannot be achieved." In Contract Steel Carriers (1956, 350 U. S. 409) the Court concluded (p. 416) that the carrier was a contract carrier because it "hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area;" and that its active solicitation of business "within the bounds of his license does not support a finding that it was 'holding itself out to the general public'." The opinion adds that a "contract carrier is free to aggressively

search for new business within the limits of his license." The 1957 amendment of the Act contained in the new subsection (c) overruled Contract Steel Carriers, by enunciating different criteria for determining whether a motor carrier is operating as a "contract," as distinguished from a "common" carrier.

A General Office Manager and Internal Accountant of Tar Asphalt testified before the Examiner that, since August 22, 1957, Tar Asphalt had at least 50 contracts pertaining to the transportation of asphalt or asphalt products of one kind or another. These contracts are normally for one year, but with a proviso that they shall continue unless cancelled by either party within a limited time after the expiration of the year. A list of 19 of these contracts, together with two invoices of Tar Asphalt for haulage in behalf of two of the parties with whom it had contracts, were admitted as late-filed exhibits after the conclusion of the hearing before the Examiner. Plaintiff does not assign vehicles for a continuing period of time for the exclusive use of each person with whom it contracts to furnish transportation. The carrier's equipment is allocated as orders come in, and then only for the period of the particular order or job. To this practice there were two possible exceptions, which were made for the convenience of the carrier, rather than for that of the shipper. An example of these exceptional instances is found in endeavor to keep one tank for the transportation of oxidized asphalt in order to relieve the carrier of the necessity of cleaning the tank of residue of the product before using it for a different product. The exceptions referred to did not constitute a setting aside of vehicles for the exclusive service of a particular shipper (as distinguished from a particular product). The evidence further disclosed that although the plaintiff operated some equipment which was insulated and equipped with heating

units and pumps, with extra long hoses to facilitate the unloading of liquid asphalt such equipment was required by the nature of the commodities transported by the plaintiff, as distinguished from the distinct need of a particular shipper. Since all of the plaintiff's customers dealt in products having generally similar characteristics, the same equipment was required for the transportation of the products of all of the customers of the plaintiff and of any others in the same production field whom it might secure. The evidence failed to disclose a separate distinct need of a particular customer for which plaintiff's equipment was peculiarly intended. Plaintiff's equipment was designed for a type of product produced by a class of customers and not for the special requirements of a particular product of a single customer. The record before the Commission failed to establish that any of plaintiff's customers had individual requirements relating to the transportation of its product which were peculiar to its business and for which the plaintiff provided a "tailormade" service to meet the individual customer's distinct needs. That plaintiff's equipment was peculiarly essential for the type of product which it transported does not negate its status as a common, as distinguished from a contract, carrier, since its specialized service may be held out to all members of the public who have occasion to ship products for which such specialized equipment is appropriate. Therefore, the Commission properly concluded that Tar Asphalt did not assign motor vehicles for a continuing period of time to the exclusive use of each of its customers, nor did it furnish transportation services designed to meet "the distinct need of each individual customer" as required by the definition of "contract carrier by motor vehicle" contained in 49 U.S.C. §303(a)(15).

Appendix A

Although plaintiff (at the time of the hearing before the Commission's Examiner) enjoyed only 19 continuing contracts with different customers, those contracts were for the transportation of a "narrow" group of related commodities consisting basically of asphalt and related petroleum products in bulk. However, plaintiff's witness testified that Tar Asphalt will enter into a transportation contract with any shipper requesting such service, provided agreeable terms for such service are arrived at. There was, therefore, substantial evidence justifying the Commission in concluding that the plaintiff will serve the ordinary needs for transportation of any shipper, of the commodities which it is equipped to handle, within its area of operations.

The plaintiff does not challenge the Commission's finding that Tar Asphalt's operations "are otherwise lawful," which is required by 49 U.S.C. §312(c) as the third prerequisite for authorization to operate as a common carrier of the products which the plaintiff handles. Plaintiff, however, contends that the proviso in the Commission's order, "that separately stated grants of operating authority shall not be joined or tacked directly one to another in order to provide a through transportation service * * *," is erroneous. The purpose of the limitation contained in that proviso is obviously to maintain substantial parity with the operating authority contained in Tar Asphalt's contract carrier permits, and is in accord with the legislative intent implicit in section 312(c) of the Act which provides for "the transportation, as a common carrier, of the same commodity between the same points or within the same territory as authorized in the permit" (for contract carriage). See *Crescent Express Lines, Inc.* v. *United States*, 1943, 320 U. S. 401. The contemporaneous construction of the Act by the Commission in this regard, as set forth in

its decision in *T. T. Brooks Trucking Co., Inc.*, Conversion Application 81 MCC 561 (1959) is entitled to great weight. *United States* v. *American Trucking Associations*, 1940, 310 U. S. 534. We accept it as a well reasoned authority.

We find to be without merit Tar Asphalt's further contention that the Commission's attempt to convert its status from that of contract carrier to that of common carrier, against the plaintiff's will amounts to a taking of private property for public use without just compensation and without due process of law in violation of the Fourteenth Amendment to the Federal Constitution. The Act does not authorize, and the Commission's order does not effect, a conversion of the plaintiff from a private carrier to a public utility. The statute does not *require* that Tar Asphalt operate as a common carrier, it merely affords an opportunity to plaintiff to continue to operate as a *common* carrier within the territory and for the purposes which it had formerly authorized by its previously issued permits. The statute merely embodies a new definition of a "contract carrier" and authorizes the Commission to determine whether one holding a permit as a contract carrier comes within that definition. The evidence before the Examiner amply sustained the Commission's conclusion that the plaintiff's operations did not bring it within the statutory definition. In this connection, plaintiff's argument that the burden of proving that it was not a contract carrier was cast upon the Commission, and required the presentation of proof by the Commission, indicates a misconception on the part of the plaintiff of the meaning and effect of section 312(e). The Commission is the administrative body to which Congress had delegated the exercise of its congressional authority in the field of interstate commerce. The Act imposes numerous inquisitorial, regulatory and supervisory duties upon the Commission in the discharge

of its statutorily authorized powers and responsibilities. Assuming, without so deciding, that plaintiff has preserved its right to contend that the burden of proof rested upon the Commission and not upon it, the statutory power reposed in the Commission by 49 U.S.C. 305(d) would have enabled the Commission to reach the same conclusion if plaintiff had not presented its witness and exhibits before the Examiner.

This Court may not set aside an order of the Commission which is within the scope of the Commission's statutory authority and based upon adequate findings supported by substantial evidence. *United States* v. *Pierce Auto. Freight Lines*, 1946, 327 U. S. 515. Where, as here, the applicable statutory language has been construed by the Commission in the light of its legislative history, such construction commands greater respect than that usually accorded administrative determinations of questions of law. *United States* v. *American Trucking Associations, supra.*

The order of the Commission is affirmed, and an appropriate order may be presented.

APPENDIX B

Report of the Interstate Commerce Commission

No. MC-93207 (Sub-No. 9)

TAR ASPHALT TRUCKING COMPANY, INC.,
CONVERSION PROCEEDING

Decided December 18, 1961

On reconsideration, findings in prior report, M. C. C., decided June 13, 1961, affirmed. Operations of respondent found to be those of a common carrier by motor vehicle, and respondent found to be entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle of the commodities and from and to the points or territories authorized by its presently-held permits. Issuance of a certificate in lieu of presently-held permits authorized upon compliance by respondent with certain conditions.

Appearance as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

Division 1, COMMISSIONERS WALRATH, WEBB, AND TUCKER

WEBB, COMMISSIONER:

By order of January 24, 1958, Division 1, upon its own initiative, instituted a proceeding under section 212(c) of the Interstate Commerce Act to determine whether outstanding permits of Tar Asphalt Trucking Company, Inc., of Jersey City, N. J., authorizing the operations described in the appendix hereto, should be revoked and a certificate

of public convenience and necessity issued in lieu thereof.

In the prior report herein, decided June 13, 1961, we concluded that respondent's operations do not conform with the definition of a contract carrier as set forth in section 203(a)(15) of the Interstate Commerce Act. The prior report, however, failed to make certain specific findings, as required by section 212(c) of the act. By order of November 8, 1961, we reopened the proceeding on our own motion to correct those deficiencies. We adopt as our own the statement of facts in the report of the examiner and in our prior report. Only those facts necessary for clarity of discussion will be restated herein.

On and since August 22, 1957, respondent has been transporting liquid asphalt, road oils, and other coal tar derivatives under 19 effective continuing contracts with individual shippers. It owns 7 tractors, 12 tank trailers, and 1 flatbed trailer and leases as many as 6 tractors and 5 trailers for use during the peak spring and summer road construction periods. Respondent's tank trailers are insulated and are equipped with heating units and pumps with extra long hoses to facilitate the unloading of liquid asphalt. For the most part, respondent does not dedicate equipment to the exclusive use of any particular shipper. It set aside equipment, however, for the exclusive use of two shippers during the periods that orders were being received from those shippers for the transportation of particular commodities. In the case of one shipper, a tank trailer was set aside for a continuing period to transport oxidized asphalt. This was done to avoid the necessity of cleaning the tank after every shipment. A tank trailer with auxiliary burner equipment was set aside for the use of another shipper for a continuing period because the commodity had to be transported at a high temperature.

Appendix B

As of August 22, 1937, the definition of a contract carrier by motor vehicle in section 203(a)(15) of the act was amended to read as follows:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein) under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

At the same time section 212(c) was added to the act. It provides in part as follows:

> The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either on its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. * * *

Appendix B.

In testing respondent's above-described operations by the criteria set forth above, it fairly appears that they do not conform to the definition of a contract carrier, and that they are the operations of a common carrier and are otherwise lawful. With the possible exception of two tank trailers which apparently were set aside for the convenience of respondent, it does not dedicate vehicles for a continuing period time for the exclusive use of each person served. Although respondent claims that it is providing a specialized service for its customers, the evidence of record fails to establish that it furnishes a transportation service designed to meet the distinct need of each individual customer. The use of heating units and pumps with extra long hoses is not indicative of a distinctive or specialized service.

Having determined that respondent's operations do not conform to the definition of contract carrier, we must now consider whether its operations are those of a common carrier. Section 203(a)(14) of the act reads in pertinent part as follows:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes. * * *

The determination hinges here on whether respondent serves a limited number of persons or holds itself out to serve the general public. We think the evidence is convincing that, despite its practice of operating only under contracts, the respondent holds itself out to any and all shippers who desire service within the scope of its relatively narrow territorial and commodity authority. As

pointed out by the Commission, Division 1, in *Armored Motor Service Co., Inc., Conversion Proceeding*, 77 M. C. C. 433, the number of contracts negotiated with shippers does not determine conclusively the carrier's status. Among the factors to be considered in section 212(c) proceedings in conjunction with the number of outstanding contracts are the different types of commodities transported, the territory in which operations are conducted, the degree of specialization required by the nature of the business of the shippers involved, and the degree of similarity in the services the carrier performs under its effective and continuing contracts. *Storch Trucking Co., Inc., Conversion Proceeding*, 82 M. C. C. 777. Weighing all of these factors, we conclude, as did the examiner, that the respondent's services are not intrinsically different from those of common carriers. Under these circumstances, respondent's contracts with 19 individual shippers, some of whom are competitors, cannot be regarded as contracts with a "limited number of persons" within the meaning of section 203(a)(15) of the act, but must be regarded as a holding out of service to the general public within the meaning of section 203(a)(14). Accordingly, we find that the respondent's operations are and have been those of a common carrier by motor vehicle.

There is no question that respondent's operations are "otherwise lawful" within the meaning of section 212(c). Respondent has confined its operations to the scope of its authority, and in all other respects appears to be in compliance with the Commission's rules and regulations.

Upon reconsideration, we find that the operations of respondent on August 22, 1957, did not and presently do not conform to the definition of a contract carrier as set forth in section 203(a)(15) of the Interstate Commerce Act, as amended; that such operations are those of a common carrier by motor vehicle and are otherwise lawful; that by

reason thereof respondent is entitled to a certificate of public convenience and necessity authorizing operation, as a common carrier by motor vehicle, in interstate or foreign commerce, of the commodities, from, to, and between the points described in the appendix hereto, provided however, that separately stated grants of operating authority shall not be joined or tacked directly or indirectly one to another in order to provide a through transportation service, nor shall duplicative authority contained in the certificate to be issued be construed as authorizing more than a single operating right; and that an appropriate certificate authorizing such operations should be granted concurrently with the revocation of the permits now held by respondent as described in the appendix hereto.

Upon compliance by respondent with the requirements of sections 215, 217, and 221(c) of the act, and with our rules and regulations thereunder, within the time provided in the order entered concurrently herein, an appropriate certificate will be issued.

An order will be entered requiring respondent to comply within the time specified therein with sections 215, 217, and 221(c) of the act, and requiring further that, should respondent fail to effect such compliance, its outstanding permits shall be revoked within a specified time. *Storch Trucking Co., Inc., Conversion Proceeding, supra.*

APPENDIX

No. MC-93207, dated September 13, 1946.

Coal-Tar, coal tar distillates and residue, asphalt and asphaltic admixtures in bulk, over irregular routes.

From Philadelphia, Pa., and points within 10 miles of Philadelphia, and those in Hudson, Union, Somerset,

Middlesex, and Bergen Counties, N. J., to points in New Jersey and New York, those in Connecticut west of the Connecticut River, and those in Pennsylvania on the east of U. S. Highway 15.

No. MC-93207 (Sub-No. 6), dated March 30, 1948.

Coal tar, coal tar distillates and residue, alphalt, and asphaltic admixtures, in bulk, in tank trucks, over irregular routes,

From Philadelphia, Pa., and points within 15 miles of Philadelphia, to points in New Jersey, New York, those in Connecticut west of the Connecticut River, and those in Maryland, and Delaware within 100 miles of Philadelphia;

From points in New York, those in Connecticut west of the Connecticut River, and those in Pennsylvania on and east of U. S. Highway 15, to points in Hudson, Union, Somerset, Middlesex, Bergen and Passaic Counties, N. J.;

From Bethlehem, Pa., to points in New Jersey; and

From points in Connecticut west of the Connecticut River to points and places in New York.

APPENDIX C

Order of the Interstate Commerce Commission

At a session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 18th day of December, A.D. 1961.

No. MC-93207 (Sub-No. 9)

TAR ASPHALT TRUCKING COMPANY, INC.,

CONVERSION PROCEEDING

It appearing, That on June 13, 1961, the Commission, division 1, made and filed its report and order in the above-entitled proceeding;

It further appearing, That upon consideration of the record, by order entered November 8, 1961, the proceeding was reopened on our own motion for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved has been given, and that the Commission, divisional, on the date hereof has made and filed a report on reconsideration, containing its findings of fact and conclusions thereon, which report and the said report of June 13, 1961, are hereby referred to and made a part hereof;

It is ordered, That the said order of June 13, 1961, be and it is hereby, vacated and set aside.

It is further ordered, That respondent shall and it is hereby required to effect compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Com-

merce Act within 150 days of the date of service of this order, unless such time be further extended; that upon such compliance, the certificate granted be issued promptly; and that concurrently with the issuance of the certificate the permits presently held by respondent shall be revoked as provided in said report.

And it is further ordered, That if respondent fails to effect compliance with the requirements of sections 215, 217, and 221(c) of the Interstate Commerce Act within the time specified herein, the permits presently held by respondent be, and they are hereby, revoked pursuant to the provisions of section 212(c) of the Interstate Commerce Act.

By the Commission, division 1.

HAROLD D. McCOY
Secretary.

(SEAL)

APPENDIX D

Section 203 (a) (15) Interstate Commerce Act [49 U. S. C. §303 (a) (15)]

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers of property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (2) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

APPENDIX E

Section 212 (c), Interstate Commerce Act [49 U. S. C. §312 (c)]

(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203(a)(15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points or within the same territory as authorized in the permit.

APPENDIX F

1957 Amendment to Section 209 (b) Interstate Commerce Act [49 U. S. C. 309 (b)]

SEC. 2. Part II of such Act is further amended (1) by inserting after the second sentence of section 209 (b) (49 U. S. C. 309 (b)) a new sentence to read as follows: "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and or its shipper and the changing character of that shipper's requirements."; and (2) by changing the third sentence of section 209 (b) (49 U. S. C. 309 (b)) to read as follows: "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and

facilities as the development of its business may require: *Provided further*, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso."

Approved August 22, 1957.

APPENDIX G

Section 203 (a) (14) Interstate Commerce Act
[49 U. S. C. 303 (a) (14)]

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be and shall be regulated as transportation subject to Chapter 1 of this title.